STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 24, 2012
v	No. 302638 Van Buren Circuit Court
RONALD GLEN VORE, III, Defendant-Appellant.	LC No. 09-016737-FC

Before: METER, P.J., and SERVITTO and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a), and second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a). He was sentenced to concurrent prison terms of 15 to 50 years on the CSC I conviction and 4 years, 9 months to 15 years on the CSC II conviction. Because defendant was not denied the effective assistance of counsel, we affirm.

Defendant was the regular babysitter for then six-year-old P. and her two siblings. On July 28, 2008, once defendant left after babysitting, P. disclosed that defendant had done "some nasty things" to her. P. told her mother that defendant "had corn juice that came out of his boy parts" and got on her shirt. P.'s mother located the shirt and called 911. P. told her mother and Detective Sharon VanDam that defendant "licked her girl parts" and "rubbed his boy parts to her girl parts" and peed on her. Detective VanDam asked the victim what her "girl parts" were, and the victim "pointed to the area between her legs and her buttocks."

Serology reports indicated the presence of seminal fluid on the victim's shirt and pants. DNA analysis found the DNA types on the victim's shirt and pants matched defendant.

On appeal, defendant argues he was denied the effective assistance of counsel because trial counsel did not request a more specific jury instruction as to first-degree criminal sexual conduct. Because the issue of ineffective assistance of counsel was not preserved through a motion for a new trial or request for an evidentiary hearing, review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002) (citation omitted).

To establish a claim of ineffective assistance of counsel, a defendant "must show that his attorney's representation fell below an objective standard of reasonableness and that this was so

prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000) (citations omitted). To show prejudice, defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 302-303 (quotation omitted).

As to jury instructions, "the trial court is required to instruct the jury concerning the law applicable to the case and fully and fairly present the case to the jury in an understandable manner." *People v Mills*, 450 Mich 61, 80; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995) (citations omitted). "Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995).

In relevant part, MCL 750.520b provides:

> A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:
>
> (a) That other person is under 13 years of age.

"Sexual penetration" is defined by statute as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(r). This definition has been further analyzed by this Court in *People v Harris*, 158 Mich App 463, 468-469; 404 NW2d 779 (1987):

> [MCL 750.520a(r)] defines "sexual penetration" as including certain types of sexual conduct. The definition does not state that, if these defined acts include penetration, they are penetration within the meaning of this section. It is rather the format of the definition that the acts in and of themselves are acts that involve sexual penetration.

Thus, "[a]n act of cunnilingus, by definition, involves an act of sexual penetration." *People v Legg*, 197 Mich App 131, 132-133; 494 NW2d 797 (1992).

In the instant case, defendant argues counsel was ineffective when he failed to request the jury be instructed that to find defendant guilty of first-degree criminal sexual conduct, it had to find that defendant's tongue or mouth intruded "into" her "genital opening" or that he engaged in cunnilingus.

At the close of proofs, the trial court instructed the jury:

> First, it is the burden of the People to show beyond a reasonable doubt that the Defendant engaged in a sexual act that involved the touching of the genital openings or genital organs of the victim with the Defendant's mouth or tongue.

> The second element of first degree criminal sexual conduct is that the victim was less than 13 years old at the time of the alleged act.

The trial court further stated, "In Count 1 you would ask yourselves . . . Did [defendant] engage in sexual penetration with [P.], that is engage in cunnilingus?" Before opening statements, the trial court also instructed the jury that sexual penetration means, among other things, cunnilingus. Thus, the trial court clearly instructed the jury that to be guilty defendant had to engage in cunnilingus. To the extent defendant argues that the jury had to find defendant's lips or mouth actually intruded "into" the genital opening, defendant is incorrect. Cunnilingus, by definition, involves sexual penetration. *Legg*, 197 Mich App at 132-133. The trial court's instructions accurately described first-degree criminal sexual conduct. MCL 750.520b; MCL 750.520a(r); *Legg*, 197 Mich App at 132-133; *Harris* 158 Mich App at 470.

Defense counsel's failure to request a more specific instruction did not fall below an objective standard of reasonableness because the instructions fully and fairly presented the case to the jury, *Toma*, 462 Mich at 302; *Mills*, 450 Mich at 80, and comported with MCL 750.520b and MCL 750.520a(r), and case law with respect to the definition of cunnilingus. Viewing the instructions as a whole and in context, there can be no mistake that the jury was aware of what the prosecution had to prove to establish first-degree criminal sexual conduct. *Bell*, 209 Mich App at 276; *Legg*, 197 Mich App at 132-133. Counsel is not ineffective for failing to make a meritless motion. *People v Riley (After Remand)*, 468 Mich 135, 142; 659 NW2d 611 (2003).

Additionally, defendant has not shown that but for his counsel's conduct, the outcome of the trial would have been different. *Id.* The evidence against defendant was substantial. There was testimony that defendant "licked" the victim's "private parts," that he put his mouth on her "private part," and that the "private part" defendant put his mouth on was the "front one" that was "between [her] legs." Further, serology and DNA analysis indicated defendant's seminal fluid was on the victim's shirt and pants. Defendant has not demonstrated that but for counsel's failure to request a more specific jury instruction, the outcome of the trial would have been different. *Toma*, 462 Mich at 302-303.

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Cynthia Diane Stephens